



IN THE MATTER OF:

Complainant,

and

Respondent.

CHARGE NO: 2001CE2610  
EEOC NO: 21BA11793  
ALS NO: S-12297

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On October 15, 2004, Respondent filed a motion for summary decision pursuant to an August 3, 2004 Order. The August 3, 2004 Order also required any response to the motion for summary decision be filed on or before November 15, 2004. No response has been filed as of the date of this Order, and Complainant, who is represented by counsel, has not sought leave to file a late response. On February 10, 2005, Respondent filed a request for entry of Order granting its motion for summary decision.

In the instant Complaint, Complainant asserts that he was the victim of handicap discrimination when Respondent placed him on administrative leave to determine whether his hearing levels were sufficient to permit him to perform the essential duties of his detective position and then refused to reinstate him to his position. In its motion for summary decision, Respondent submits that it denied Complainant's request to return to work after it received the opinion from its expert that Complainant could not safely perform the duties of his job, that Complainant's hearing impairment was directly related

to his ability to perform his detective position, and that as a result, his condition was not a protected "handicap" under the Human Rights Act.

### **Findings of Fact**

Based upon the record in this matter, I make the following finding of fact:

1. On February 5, 1975, Complainant was hired by Respondent as a member of its police force. While the record is unclear as to all of the positions Complainant held within the police force, the record indicates that at some point he was employed as a firearms instructor, that he experienced some hearing problems arising out of this assignment, and that he transferred to the subject detective position in approximately June of 1998.

2. As a detective, Complainant was responsible for a wide range of duties including, but not limited to, substantial communications with other officers, witnesses, suspects, trial attorneys and judges, both in person and via telephone.

3. At some point during his tenure as a detective, Complainant became fitted for hearing aids.

4. By January 25, 2001, Complainant's supervisors had become aware of complaints regarding Complainant's job performance that seemed to be related to his hearing impairment. Specifically, Complainant's supervisors either witnessed or heard about Complainant: (1) taking the wrong name/number for telephone messages; (2) transferring calls because he misunderstood or could not hear what the caller was asking for; (3) telling the caller to "speak up"; (4) being unaware that he was being spoken to in person when facing away; (5) supplying responses that bore no relation to the questions posed over the radio; and (6) supplying inappropriate responses while testifying to questions posed in court.

5. On January 25, 2001, Lieutenant Douglas Miler, Complainant's supervisor, issued a recommendation to Police Chief Carl Alexander that Complainant

be directed to submit to a fitness-for-duty assessment in light of his apparent hearing problems.

6. On January 31, 2001, Complainant was assessed by Dr. Steven Moffatt and underwent an audiological examination to determine a range of decibel loss in Complainant's hearing, as well as any resultant impairment on Complainant's ability to understand conversational speech. As a result of this examination, it was determined that Complainant's unaided speech discrimination capabilities in various modes were "poor", and that even with the assistance of hearing aids, Complainant was correct only 60 per cent of the time in his responses in a quiet environment and was correct only 56 per cent of the time in his responses in a moderate noise environment.

7. In his report of February 6, 2001, Dr. Moffatt indicated that: (1) Complainant had a substantial hearing loss which exceeded the Police Department's 30 decibel threshold in frequency ranges between 500 and 3,000 cycles; and (2) as a result of this deficiency, Complainant had a decreased understanding of conversational speech which interfered with critical speech determination.

8. On February 14, 2001, Complainant returned for another examination with re-programmed hearing aids. However, during this test, Complainant again demonstrated an unaided hearing threshold of 30 decibels or greater for frequency ranges from 500 to 3,000 cycles and had aided speech discrimination scores of 72 per cent in a "quiet" environment and 68 per cent in a noise environment. Based on these scores, Dr. Moffatt reported to Chief Alexander that, despite efforts to maximize Complainant's hearing abilities through augmentation, Complainant still posed a significant risk to his fellow officers and to the public.

9. On March 5, 2001, Chief Alexander informed Complainant that due to Dr. Moffatt's findings and recommendations, and due to the lack of any proposed

accommodations, the Department was left with no choice but to consider Complainant's termination for failure to satisfactorily perform the duties of a police officer.

10. On March 12, 2001, Complainant went to Audiologist Diane Voelker whom he selected for further consultation and testing. In her report, Voelker indicated that Complainant tested within the 30-decibel threshold required by the Department, but that Complainant's speech discrimination scores were only 76 per cent in a quiet environment and 64 per cent in a noise environment.

11. Complainant thereafter sought his return to active duty after tendering Voelker's report to Respondent.

12. Voelker's report was forwarded to Dr. Moffatt, who issued an April 11, 2001 report noting that Voelker's decibel testing of Complainant was conducted only in a quiet environment. He also stated in the report that while Complainant's request for a hearing impaired telephone was reasonable, the telephone would not assist him in other essential aspects of the detective position that did not require use of the telephone. Dr. Moffatt additionally re-asserted that in view of the speech discrimination scores, Complainant's hearing condition presented a concern for the safety of the public, fellow officers and himself.

13. Respondent ultimately denied Complainant's request for a return to active duty, and Complainant remained in an off-duty status using up accumulated leave time. Complainant thereafter filed a Charge of Discrimination alleging that he was the victim of handicap discrimination when Respondent refused to permit him to go back on active duty.

### **Conclusions of Law**

1. The Commission will not search the record to find a reason to deny a motion for summary decision where the motion otherwise appears to be valid on its face.

2. Complainant is an “employee” as that term is defined under the Human Rights Act.

3. Respondent is an “employer” as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

4. Complainant failed to present any evidence to refute the sworn allegations in the instant motion for summary decision that Complainant’s hearing condition prevented him from performing essential functions of his detective job with or without any reasonable accommodation.

#### **Determination**

Respondent’s motion for summary decision should be granted since Complainant failed to respond in any fashion to the pending motion for summary decision, and the motion otherwise appears to be valid on its face.

#### **Discussion**

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (See, section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and **Bolias and Millard Maintenance Service Company**, 41 Ill. HRC Rep. 3 (1988).) Moreover, in determining whether there is any genuine issue of material fact, the record is construed most strictly against the moving party and most liberally in favor of the opponent. (See, for example, **Armagast v. Medici Gallery and Coffee House**, 47 Ill.App.3d 892, 365 N.E.2d 446, 8 Ill.Dec. 208 (1<sup>st</sup> Dist., 5<sup>th</sup> Div. 1977).) Inasmuch as a summary order is a drastic method of disposing of cases, it should only be allowed when the right of the moving party is clear and free from doubt. (See, **Susmano v. Associated Internists of Chicago**, 97 Ill. App.3d 215, 422 N.E.2d 879, 52 Ill.Dec. 670 (1<sup>st</sup> Dist. 1981).) Furthermore, although there is no requirement that Complainant prove

his case to overcome the motion, Complainant is required to present some factual basis that would arguably entitle him to a judgment under the applicable law. See, **Schoondyke v. Heil, Heil, Smart & Golee Inc.**, 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1980).

As to the merits of Respondent's motion, it should be noted initially that the Commission, in **Jones and Burlington Northern Railroad**, 25 Ill. HRC Rep. 101 (1986), observed that:

"We will not search the record to find reasons to deny a motion. If the motion appears valid on its face, and if the other side cannot tell us why the motion should not be granted we will grant the motion."

Here, Complainant has placed himself in a similar predicament by failing to file any sort of response to the instant motion for summary decision. See also, **Fitzpatrick v. Human Rights Commission**, 267 Ill.App.3d 306, 642 N.E.2d 486, 490, 204 Ill.Dec. 785, 789 (4<sup>th</sup> Dist. 1994) for the related proposition that a party cannot rely on his pleadings to create a genuine issue of fact where the moving party supplies sworn facts which would warrant a judgment in its favor as a matter of law.

Here, Respondent presented the affidavit of Lieutenant Miller to establish the background of Complainant hearing difficulties, the steps Respondent took to obtain an assessment of Complainant's hearing impairment, and the relationship that his impairment had to his job duties as a detective in Respondent's Police Department. Specifically, the medical tests indicated that Complainant's hearing levels/speech discrimination scores did not meet the minimum standards required by the Police Department. Moreover, while Complainant's audiologist indicated that Complainant satisfied the decibel test levels, both Complainant's audiologist and Respondent's expert indicated that Complainant failed to understand approximately one out of every four words spoken in certain settings, and one out of every three words spoken in other settings. Given the fact that Complainant's audiologist admitted in her report that she

had no familiarity with the circumstances surrounding Complainant's work as a detective and was unable to address the speech discrimination scores necessary to successfully perform Complainant's job, I find that Complainant has not set forth any evidence to counter Dr. Moffatt's assessment that Complainant's hearing problems rendered him unfit for duty. Under these circumstances and in view of the fact that Complainant has not responded to the instant motion for summary decision, I find that Respondent is entitled to an issuance of a summary decision in its favor based on the fact that Complainant has not shown that he has a "qualifying" condition that is protected by the Human Rights Act.

**Recommendation**

For all of the above reasons, it is recommended that Respondent's motion for summary decision be granted, and that the instant Complaint and the underlying Charge of Discrimination of Richard Anderson be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 1<sup>st</sup> DAY OF MARCH, 2005

